COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	D.T.E. 01-31-Phase I

September 14, 2001

HEARING OFFICER RULING ON MOTION BY AT&T COMMUNICATIONS OF NEW ENGLAND, INC. TO COMPEL DISCOVERY RESPONSES BY VERIZON MASSACHUSETTS, OR, IN THE ALTERNATIVE, TO STRIKE TESTIMONY OF ROBERT MUDGE AND WILLIAM E. TAYLOR, AND MOTION BY VERIZON MASSACHUSETTS FOR CONFIDENTIAL TREATMENT

I. INTRODUCTION

On August 27, 2001, AT&T Communications of New England, Inc. ("AT&T") filed with the Department of Telecommunications and Energy ("Department") a Motion to Compel Discovery Responses By Verizon Massachusetts, Or, In the Alternative, to Strike the Testimony of Robert Mudge and William E. Taylor ("AT&T Motion to Compel"). In its Motion to Compel, AT&T requested that the Department require Verizon Massachusetts ("Verizon" or "VZ–MA") to respond to certain AT&T's information requests, ATT-VZ-1-1, 1-2(a), and 1-3 (AT&T Motion to Compel at 1). Also on August 27, 2001, Verizon filed a Motion for Confidential Treatment of its responses to information requests AG-VZ-3-19, ATT-VZ-1-1, and 1-2 ("VZ–MA Motion for Confidential Treatment").[1] Upon request that AT&T supplement its Motion to Compel, on August 30, 2001, AT&T filed a supplement ("AT&T Supplement"). On September 7, 2001, Verizon filed an opposition to AT&T's Motion to Compel ("VZ–MA Opposition"); the Massachusetts Attorney General ("AG") and Network Plus, Inc. ("Network Plus") filed comments in support of AT&T's Motion to Compel ("AG Comments" and "Network Plus Comments," respectively). Also on September 7, 2001, AT&T filed an opposition to VZ–MA's Motion for Confidential Treatment ("AT&T Opposition").

[1] The information requests and responses subject to AT&T's Motion to Compel and VZ–MA's Motion for Confidential Treatment are attached as Appendix A.

II. STANDARD OF REVIEW

A. Discovery

With respect to discovery (i.e., information requests), the Department's regulations provide:

> The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)1. Hearing Officers have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)2. Mass. R. Civ. P. 26(b)(1) provides that:

> Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Finally, G.L. c. 30A, § 12(1) provides agencies with the power to require the testimony of witnesses and the production of evidence. G.L. 30A, § 12(3) states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

B. Confidentiality

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the

Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data, regardless of physical form or characteristics, received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113 at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39 at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18 at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not been and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. POSITIONS OF THE PARTIES

A. AT&T's Motion to Compel

1. AT&T

In its Motion to Compel, AT&T argues that the Department should require Verizon to respond to AT&T's information requests, ATT-VZ-1-1, 1-2(a), and 1-3 (AT&T Motion to Compel at 1). In the alternative, if Verizon is not compelled to provide this information, AT&T moves to strike the testimony of Verizon witnesses, Robert Mudge and William E. Taylor, to the extent that their testimony relies on the information AT&T seeks to have produced (id.). AT&T argues that it is entitled to information upon which Verizon relies to justify its alternative regulation plan (id.). AT&T argues that Verizon uses the information contained in the E911 database to support its claims that sufficient competition exists to justify deregulation (id. at 2). However, argues AT&T, Verizon is the only party who has access to all the information contained in the E911 database, and Verizon refuses to provide the basis for its claims (id.). AT&T asserts that Verizon should not be allowed to rely on E911 database information when it refuses to provide the basis for its reliance (id.). Further, AT&T asserts that the information requested in ATT-VZ-1-1, 1-2(a), and 1-3, namely, which carriers list numbers in the E911 database and the types of services they provide, is essential for the assessment of the competitiveness of CLECs in the Massachusetts markets, and without disclosure of the names of the carriers listed in the database, AT&T and other parties cannot identify from whom to gain authorization for the release of the database information (id. at 2-3). In the alternative, AT&T argues that the testimony of Verizon witnesses, Robert Mudge and William E. Taylor, should be stricken (id. at 4). Without disclosing the list of carriers providing numbers to the E911 database and the services provided by those carriers, AT&T argues that the testimony of Mr. Mudge and Dr. Taylor which relies on the listing in the E911 database is meaningless (id.). Further, AT&T asserts that it has reason to believe that any use of data from the E911 database to demonstrate competition is a useless endeavor as the number of full facilities-based lines could be skewed either too high or too low, and, therefore, the database is not a reliable measure of market share and should not be relied upon to justify deregulation (id.).

2. Attorney General

The Attorney General supports AT&T's Motion to Compel (AG Comments at 1). The Attorney General asserts that Verizon should not be permitted to use or otherwise rely on data and information to build or support its case in this proceeding if Verizon refuses or is unable to provide such data and information to other parties (id. at 3). The Attorney General asserts that CLECs have the right to protect their proprietary information and should play a role in determining whether that information may be shared (id.). This includes, argues the Attorney General, use by Verizon of that information (id. at n.7). The Attorney General argues that

because Verizon has made CLEC proprietary information an issue by relying upon it to support Verizon's contentions regarding competition, the parties must be able to conduct discovery upon it or else the parties will be denied due process (id. at 3). If Verizon is not compelled to produce the CLEC E911 information, the Attorney General argues that the Department must strike the testimonies and information request responses that refer to or rely on the CLEC E911 data (id. at 3-4).

3. Network Plus

Network Plus also supports AT&T's Motion to Compel (Network Plus Comments at 1). Network Plus argues that use by Verizon of the confidential E911 information in this proceeding is a violation of 47 U.S.C. § 222(b), which prohibits Verizon from using such information for any purpose other than providing E911 telecommunications services (id. at 1-2). Network Plus asserts that if Verizon wishes to use such information in this proceeding, it is required to obtain CLEC authorization to do so, which it did not obtain or even seek to obtain from Network Plus (and presumably other CLECs) prior to sharing the information with Verizon employees and consultants for use in this proceeding (id. at 2). Network Plus argues that Verizon's acting in violation of § 222(b) supports striking the testimony of Verizon witnesses Mudge and Taylor, because Verizon should not be permitted to rely on information when it needed, but did not get, authorization from CLECs to access and use the information for this purpose (id. at 2-3). Network Plus further argues that Verizon is not only improperly using the E911 information as a "sword" to further Verizon's own interests, but also as a "shield" to frustrate CLECs' conducting a complete investigation (id. at 3). Network Plus asserts that Verizon's requirement that other parties obtain authorization from the numerous but unidentified CLECs with information contained in the E911 database before Verizon will make the E911 information available is not only hypocritical but presents nearly insurmountable problems (id.). Therefore, Network Plus argues that the Department should strike the Mudge and Taylor testimony, or, if the Department finds that Verizon's use of the E911 information is permissible, the Department should permit all parties an equal right to look at the information on the same basis as Verizon (i.e., without obtaining specific CLEC disclosure authorization) (id.).

4. Verizon

In its Opposition, Verizon asserts that AT&T's Motion to Compel should be denied (VZ–MA Opposition at 1). Verizon argues that its responses to ATT-VZ-1-1 and ATT-VZ 1-2(a) are entitled to protection from disclosure to parties other than the Department (id.). Verizon argues that the responses contain data which are the confidential and proprietary information of relevant competing carriers which may not be disclosed by Verizon without the carriers' authorization (id. at 1-2). Verizon points to a recent hearing officer ruling which provided protective treatment to what Verizon asserts is similar third-party data (id. at 2 and n.4). Verizon argues that it is responding reasonably to parties' relevant discovery requests

and is not refusing to provide the basis for its reliance on E911 database information, but is requesting the "highest level" of protective treatment for the information, similar to AT&T's own request in AT&T's recent motion for protective treatment (id. at 3). Lastly, Verizon asserts that if the Department orders disclosure of the E911 information, Verizon will make such information available to other parties in this proceeding, subject to mutually agreeable protective agreements (id.).

B. Verizon's Motion for Confidential Treatment

1. Verizon

In its Motion for Confidential Treatment, Verizon asserts that its responses to information requests AG-VZ-3-19, ATT-VZ-1-1, and 1-2 are confidential, proprietary information and are entitled to protection from public disclosure (VZ–MA Motion for Confidential Treatment at 1). Verizon asserts that the attachment responsive to AG-VZ-3-19 identifies the number of subscribers who have changed service providers from Verizon to a CLEC (id. at 3). This information, argues Verizon, represents valuable service-specific commercial information that competitors could find useful in establishing sales and network strategies that target particular market segments (id.). Verizon asserts that the attachment responsive to ATT-VZ-1-1 identifies a list of all competitive carriers that appear in the "COMPANY ID" field in Verizon's response to AG-VZ-2-5, part g (id. at 4). Verizon asserts that this information is the confidential and proprietary information of the relevant competitive carriers and cannot be disclosed without the carriers' authorization (id.). Likewise, Verizon asserts that the attachments responsive to ATT-VZ-1-2, which contain information regarding the identity and number of competitive carriers that have E911 listings per class of service, contain confidential and proprietary information (id.). Verizon asserts that it may not disclose the information contained in Attachment 1 of its response to ATT-VZ-1-2 without the authorization of the competitive carriers (id.). Verizon has offered to make the information contained in Attachment 2 of its response to ATT-VZ-1-2 available subject to a mutually agreeable protective agreement (id.).

Verizon argues that the information for which it is seeking protective treatment is compiled from internal databases that are not publicly available (id. at 5). Verizon argues that the information for which it seeks protective treatment is not shared with non-Verizon employees for their personal use, and that any dissemination to non-employees is labeled proprietary (id.). Verizon further argues that Verizon employees and agents using this information are subject to non-disclosure agreements and that the data are transferred internally over a protected network and marked proprietary (id.). Verizon asserts that Verizon marketing personnel are not given access to the information for the purpose of competing against other providers (id.). Verizon contends that competitors can use the information to develop their own competitive offerings and identify which Verizon services to "target" (id.). Lastly,

Verizon argues that other companies are not subject to the same level of scrutiny to which disclosure of such information would expose Verizon (id. at 6).

2. AT&T

In its opposition, AT&T argues that Verizon's Motion for Confidential Treatment should be denied (AT&T Opposition at 1). AT&T asserts that it is entitled to information used by Verizon to justify its alternative regulation plan, and that Verizon should not be allowed to take advantage of its position as incumbent to have superior access to information relevant to this proceeding in order to advance its interests over competitors' (id. at 2). AT&T suggests that the Department follow the example set in D.P.U./D.T.E. 97-96, at 24-25 (May 29, 1998), in which the Department required incumbent gas and electric distribution companies to provide competitive suppliers non-discriminatory access to products, services, and information held by distribution companies in their capacity as regulated monopolies (id. at 3). In addition, AT&T argues that Verizon has not met its burden of proof under G.L. c. 25, § 5D, to show that the information for which it seeks protection is confidential (id. at 4). AT&T asserts that Verizon has provided no proof at all that the requested information is competitively sensitive or that disclosure of the information will affect CLEC's ability to compete in the business market, particularly if disclosure is made to parties in this proceeding pursuant to a protective agreement (id. at 4-5). Finally, AT&T argues that Verizon should not be allowed to provide the requested information only to the Department in this proceeding and not the parties, as this raises due process concerns (id. at 6). AT&T asserts that Verizon's use of a discovery request to communicate substantive information to the Department, while denying parties an opportunity to respond, threatens the integrity of the administrative adjudicatory process (id.).

IV. ANALYSIS AND FINDINGS

AT&T's Motion to Compel and Verizon's Motion for Confidential Treatment concern the same information requests and responses except as to ATT-VZ-1-3 and AG-VZ-3-19. I will discuss these responses first. Because AT&T indicated in its Supplement to AT&T's Motion to Compel that it has tentatively reached agreement with Verizon on ATT-VZ-1-3, and because Verizon filed a Supplemental Response to ATT-VZ-1-3 on September 7, 2001, I conclude that this portion of AT&T's Motion to Compel is moot and need not be addressed in this ruling. With regard to AG-VZ-3-19, for the following reasons, I do not agree with Verizon that its response to AG-VZ-3-19 warrants confidential treatment. Verizon asserts that the number of residential and business subscribers who have changed service provider from Verizon to a competing provider in 2000 and 2001 represents service-specific commercial information that competitors could find useful in establishing sales and network strategies that target particular market segments (VZ–MA Motion for Confidential Treatment at 3). However, it is unclear from VZ–MA's Motion for Confidential Treatment how public disclosure of the number of subscribers per month who change providers would aid a competitor in developing its sales and network strategies to target either Verizon's business or residential market

segments. Moreover, the number of subscribers that actually change service providers in response to the presence of competition in Massachusetts is highly relevant to this phase of the proceeding. Therefore, VZ–MA's Motion for Confidential Treatment of AG-VZ-3-19 is denied.

Turning to AT&T's Motion to Compel, I determine that Verizon has neither violated 47 U.S.C. § 222(b), nor has Verizon been unreasonable in its refusal to disclose to parties in this proceeding third-party specific information in Verizon's province, without authorization from the third-parties involved. This has been the prior practice in this proceeding and in other Department proceedings. See Hearing Officer Ruling, D.T.E. 01-31-Phase I at 4 (August 29, 2001); Hearing Officer Ruling, D.T.E. 98-57, at 5 (November 5, 1999). However, I further conclude that the parties in this proceeding must have access to this information upon which Verizon relies for its assertions regarding sufficient competition. AT&T, Network Plus, and the Attorney General are correct in that the Department's investigation and eventual decision in this proceeding would be lacking an essential element if opposing parties were not permitted to evaluate fully and contest Verizon's assertions. I also agree with AT&T and Network Plus that requiring parties to obtain authorization from numerous and unidentified third-parties prior to Verizon's release of the information presents virtually insurmountable barriers to parties' obtaining the information. Therefore, I direct Verizon to provide the CLEC E911 information in ATT-VZ-1-1 and 1-2 to the parties in this proceeding subject to protective agreements. The Department agrees to provide protective treatment to this information pursuant to G.L. c. 25, § 5D. As I grant in part AT&T's request for access to the CLEC E911 data, I do not reach AT&T's alternative motion and parties' related comments concerning striking the testimony of Verizon witnesses, Robert Mudge and William E. Taylor.

In closing, I stress again the responsibility of the parties to attempt to resolve discovery disputes prior to coming to the Department for assistance. See Hearing Officer Memorandum, D.T.E. 01-31-Phase I (August 28, 2001) (requiring a showing that moving parties make a reasonable attempt at resolution prior to submitting motion). Discovery is supposed to work without constant Department intervention. Therefore, future motions in this proceeding relating to discovery disputes will not be favorably received if they lack a showing that the moving party made a good faith effort to resolve the dispute before filing its motion.

V. RULING

AT&T's Motion to Compel is granted in part. Verizon's Motion for Confidential Treatment is granted in part and denied in part.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: September 14, 2001 _____/s/_____
Paula Foley, Hearing Officer

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
D.T.E. 01-31-Phase I

Information Requests Subject to Motion of AT&T Communications of New England, Inc. to Compel Discovery Responses by Verizon Massachusetts, Or, In The Alternative, AT&T's Motion to Strike Testimony of Robert Mudge and William E. Taylor, and Verizon's Motion for Confidential Treatment

ATT-VZ-1-1: Please identify and provide, pursuant to a mutually agreeable protective agreement, a list of all companies in the "COMPANY ID" field referenced in your response to AG-VZ 2-5, part g.

RESPONSE: Respondent: Robert Mudge

The requested data are the confidential and proprietary information of the CLECs that may not be disclosed by Verizon without the CLEC's authorization. The information is, accordingly, being provided only to the Department and to those parties to whom the CLECs authorize disclosure.

Please see Attachment 1 which provides a list of all the CLECs that appear in the "COMPANY ID" field referenced in the Company's response to AG-VZ 2-5, part g. The list does not include Verizon MA, wireless carriers or independent telephone companies.

ATT-VZ-1-2: Please refer to the E911 documentation found at the internet site identified in Verizon's response to AG-VZ 2-5, part e, and specifically to the VERIZON REGIONAL E911 PS/ALI GUIDE, which lists the following classes of service to be identified for each listing in the E911 database:

1 - Residence

2 - Business

3 - Residence Private Branch Exchange

4 - Business PBX

5 - Centrex

6 - Coin - one way

7 - Coin - two way

8 - Mobile

9 - Off-premise extension, Residence

0 - Off-premise extension, Business

a) Please provide, pursuant to a mutually agreeable protective agreement, a list of the companies in the E911 database which provide each of the foregoing classes of service.

b) Please provide the number of companies which have listings for each of the foregoing classes of service.

RESPONSE: Respondent: Robert Mudge

a) The requested data are the confidential and proprietary information of the CLECs that may not be disclosed by Verizon MA without the CLEC's authorization. The information is, accordingly, being provided only to the Department and to those parties to whom the CLECs authorize disclosure.

Please see Attachment 1 which provides a list of all CLECs that have E911 listings that carry each of the classes of service referenced above. The list does not include Verizon MA, wireless carriers or independent telephone companies.

b) Verizon considers data responsive to this request proprietary and competitively sensitive. The data will be made available to the extent provided for in a mutually agreeable Protective Agreement.

Please see Attachment 2 which provides a count of all of the CLECs that have E911 listings that carry each of the classes of service referenced above. The count does not include Verizon MA, wireless carriers or independent telephone companies.

AG-VZ-3-19 For each month beginning in January 2000 and through the most recent period for which data is available, please provide the following information:

a. The number of residential subscribers who have changed service provider from Verizon MA to a CLEC.

b. The number of residential subscribers who have changed service provider from Verizon MA to a CLEC who are contacted by Verizon MA in an effort to "win them back" to Verizon MA.

c. The number of residential subscribers who have received some form of "win-back" contact who return to Verizon MA within 30 days of receiving such contact.

d. The compensation that is paid to a Verizon MA representative for each successful "win-back" of a residential customer by that representative. Please specify whether the compensation received is in the form of money, other goods and services, or other in-kind compensation.

e. The number of business subscribers who have changed their service providers from Verizon MA to a CLEC.

f. The number of business subscribers who have changed their service providers from Verizon MA to a CLEC who are contacted by Verizon MA in an effort to "win them back" to Verizon MA.

g. The number of business subscribers who have received some form of "win-back" contact who return to Verizon MA within 30 days of receiving such contact.

h. The compensation that is paid to a Verizon MA representative for each successful "win-back" of a business customer by that representative. Please specify whether the compensation received by the individual representative is in the form of money, other goods and services, or other in-kind compensation.

RESPONSE: Respondent: Robert Mudge

a. Verizon MA considers data responsive to this request proprietary and competitively sensitive. The data will be made available to

the extent provided for in a mutually agreeable Protective Agreement.

b-d. Verizon MA objects to these requests on the grounds that they are overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seek the disclosure of confidential and commercially sensitive material.

e. Verizon MA considers data responsive to this request proprietary and competitively sensitive. That data will be made available to the extent provided for in a mutually agreeable Protective Agreement.

f-h. Verizon MA objects to these requests on the grounds that they are overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seek the disclosure of confidential and commercially sensitive material.